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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-762

CAROL MAUREEN SOSNA,

Appellant,

v.

THE STATE OF IOWA,

Appellee.

APPELLEE'S MOTION TO DISMISS

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OPINION BELOW

The opinion and order of the three-judge court of the northern district of Iowa is marked as Appendix A of Appellant's Jurisdictional Statement and as 42 U.S.L.W. 2086 and 380 F.Supp. 1182. This decision dismissed the appellant's case in the trial court.

JURISDICTION

The appellant alleges jurisdiction of this appeal by this court under the provisions of 28 U.S.C. §1253.

QUESTIONS PRESENTED

The appellant presents two questions to this Court which are stated as follows:

A. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the appellant's Fourteenth Amendment right to equal protection of the laws by creating a discriminatory classification which has the effect of penalizing her fundamental right of free interstate migration and which is not justified by a compelling state interest?

B. Do Sections 598.6 and 598.9 of the Code of Iowa present an unconstitutional infringement upon the rights guaranteed to the Appellant by the First Amendment and the Due Process Clause of the Fourteenth Amendment by denying access to the courts through an irrebuttable presumption of law which is overbroad in its reach and which is not justified by a state interest of overriding significance?

STATUTES

The following statutes from the Code of Iowa and the United States Constitution are alleged relevant to this case:

Section 1 of the 14th Amendment to the Constitution of the United States;

Section 598.6, Code of Iowa, 1971;

Section 598.9, Code of Iowa, 1971;

Section 598.16, Code of Iowa, 1971;

Section 598.19, Code of Iowa, 1971.

Section 1 of the 14th Amendment to the U.S. Constitution and the above designated Iowa statutes are reproduced and will be found as Appendix A to this motion.

STATEMENT OF THE CASE

For the purposes of this appeal, the appellee agrees with the statement of the case found in the appellant's Jurisdictional Statement at pages four (4) and five (5).

ARGUMENT

Two judges of the three-judge court convened to hear this case in the trial below directly found that divorce or dissolution of marriage is not a constitutional right, nor is it a basic necessity to survival, and cannot be considered a "fundamental right" and hence, refused to apply the "strict scrutiny" test, when considering the one-year residence requirement in actions commenced by recent arrivals in the State. *Pennoyer v. Kness*, 95 U.S. 714, 734-35, S.Ct. (1877). In the opinion of the judges, and traditionally so, divorce or dissolution is wholly a creature of statute, with the absolute power to prescribe the conditions relative thereto be invested in the State.

The opinion also noted as significant, the fact that in 1970 the State of Iowa had adopted a dissolution of marriage act which was based upon a "no fault concept of divorce". Referring to 20 Drake Law Review 211 (1971). The opinion stated:

"While this innovative reform promotes a more harmonious dissolution of a marrital breakdown, . . . , it was not the intent of the legislature to create in Iowa a virtual sanctuary transcend divorces based upon sham domiciles. To the contrary, Iowa

law favors preservation of marriage whenever possible, as evidenced by the 90-day conciliation period of the new Iowa act."

The court went on to find that Iowa's interest in establishing a 1-year deferral period is sufficiently compelling to render the durational residency requirement constitutionally permissible.

On page six (6) of its Jurisdictional Statement, appellant has stated three cases that have found divorce residency requirements unconstitutional. The *Wymelenberg*, the *Larson* and the *Mon Chi Heung Au*, at the citations indicated therein. In both the *Wymelenberg* and *Larson* cases, the respective courts relied heavily upon *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322 (1969) (a case overturning a one-year residency requirement before new arrivals could be eligible for welfare benefits–a necessity of life) and *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972), (a case concerned with residency requirements for purposes of voting). The holding in the *Mon Chi Heung Au* case decided by the Federal District Court in Hawaii in 1969, holding divorce residency requirements unconstitutional, was not cited in the more recent case by the Hawaii Supreme Court in *Whitehead v. Whitehead*, 492 P.2d 939 (1972) where that court held the residency requirements of the divorce law constitutional and thoroughly distinguished the *Shapiro* and *Dunn* cases.

In addition to the *Whitehead* case, other state courts and a recent federal district court case from Florida have upheld the divorce residency requirement statutes; *Place v. Place*, 278 A.2d 710 (Vermont, 1971); *Coleman v. Coleman*, 291 N.E.2d 530 (Ohio, 1972); *Shiffman and Makres, Plaintiffs, v. Askew* (M.D. Florida, Tampa Division, June 1, 1973), 359 F.Supp. 1225 (1973). In

this latter case, District Court Judge Hodges extensively reviewed the cases on this question and the philosophy behind the residency requirement in divorce or dissolution of marriage proceedings (Florida has also adopted a "no fault" dissolution of marriage law).

The *Shapiro* and *Dunn* cases clearly point out that being denied the right to welfare benefits immediately effects a basic need and not being able to exercise a constitutional right to vote in an election denies a right that is lost forever, hence, the authority of these cases, based upon the factual situations presented in them, cannot be doubted. However, it cannot be successfully contended that the same result must be reached when considering divorce or dissolution of marriage residency requirements.

CONCLUSION

For the above and foregoing reasons, this appeal should be dismissed and the order entered by the three-judge district at the trial of the case should be affirmed.

Respectfully submitted,

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APPENDIX A

Constitution of the United States, Amendment 14, §1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Code of Iowa, 1971; Section 598.6

"Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage, in addition to setting forth the information required by section 598.5, must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only."

Code of Iowa, 1971; Section 598.9

"If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the court."

Code of Iowa, 1971; Section 598.16

"A majority of the judges in any judicial district, with the co-operation of any county board of social welfare in

such district, may establish a domestic relations division of the district court of the county where such board is located. Said division shall offer counseling and related services to persons before such court.

"The court shall require such parties to undergo conciliation for a period of at least ninety days from the issuance of an order setting forth the conciliation procedure and the conciliator. Such conciliation procedures may include, but shall not be limited to, referrals to the domestic relations division of the court, if established, public or private marriage counselors, family service agencies, community mental health centers, physicians and clergymen. Conciliation may be waived by the court upon a showing of good cause; provided, however, that it shall not be waived if either party or the attorney appointed pursuant to section 598.12 objects."

Code of Iowa, 1971; Section 598.19.

"No decree dissolving a marriage shall be granted in any proceeding before ninety days shall have elapsed from the day the original notice is served, or from the last day of publication of notice, or from the date that waiver or acceptance of original notice is filed or until after conciliation is completed, whichever period shall be longer. However, the court may in its discretion, on written motion supported by affidavit setting forth grounds of emergency or necessity and facts which satisfy the court that immediate action is warranted or required to protect the substantive rights or interests of any party or person who might be affected by the decree, hold a hearing and grant a decree dissolving the marriage prior to the expiration of the applicable period, provided that requirements of notice have been complied with. In such case the grounds of emergency or necessity and the facts with respect thereto shall be recited in the decree unless otherwise ordered by this court."